U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

FILE [redacted] Office: Portland (POM) Date: SEP 20 2000

IN RE: Applicant: [redacted]

APPLICATION: Application for Certificate of Citizenship under § 341(a) of the Immigration and Nationality Act, 8 U.S.C. 1452(a)

IN BEHALF OF APPLICANT: Self-represented

Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

DISCUSSION: The application was denied by the District Director, Portland, Maine, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The applicant was born on August 10, 1984, in Thailand. The applicant's father, [redacted] was born in Thailand in 1950 and became a naturalized U.S. citizen on April 17, 1997. The applicant's mother, [redacted] was born in Thailand in October 1956 and never had a claim to United States citizenship. The applicant listed his mother's name as [redacted] on his visa application. The applicant's parents married each other on May 13, 1983, and divorced on June 1, 1995. The applicant was lawfully admitted for permanent residence on January 12, 1990. The applicant is seeking a certificate of citizenship under § 322 of the Immigration and Nationality Act (the Act), 8 U.S.C. 1433.

The district director reviewed the record and concluded that the applicant had failed to establish he was in the full legal custody of his father and denied the application accordingly.

On appeal, the applicant's father states that he could not inform the officer who conducted the interview on March 15, 2000 of his ex-wife's address because her residence was unstable and she was looking for a new place to live. The applicant's father states that he answered truthfully when he stated that he did not know what her address was. The applicant's father has not explained why he indicated in March 2000 that the applicant's mother had resided in the United States from 1990 to 1996 when he knew full-well that she was still in the United States on March 2000.

On appeal, the applicant's father states that the applicant's mother changed her first name and he forgot to give the paper to the officer. The record contains a document registered at the Thai Consulate in New York on December 23, 1992 granting Mrs. [redacted] permission to change her personal name to [redacted]

Section 322. CHILD BORN OUTSIDE THE UNITED STATES; APPLICATION FOR CERTIFICATE OF CITIZENSHIP REQUIREMENTS

> (a) APPLICATION OF CITIZEN PARENTS: REQUIREMENTS.-A parent who is a citizen of the United States may apply to the Attorney General for a certificate of citizenship on behalf of a child born outside the United States. The Attorney General shall issue such a certificate of citizenship upon proof to the satisfaction of the Attorney General that the following conditions have been fulfilled:
>
> (1) At least one parent is a citizen of the United States, whether by birth or naturalization.
>
> (2) The child is physically present in the United States pursuant to a lawful admission.
>
> (3) The child is under the age of 18 years and in the legal custody of the citizen parent.

[redacted]

(4) If the citizen parent is an adoptive parent of the child, the child was adopted by the citizen parent before the child reached the age of 16 years and the child meets the requirements for being a child under subparagraph (E) or (F) of § 101(b)(1).

(5) If the citizen parent has not been physically present in the United States or its outlying possessions for a period or periods totaling not less that 5 years, at least 2 of which were after attaining the age of 14 years-

(A) The child is residing permanently in the United States with the citizen parent, pursuant to a lawful admission for permanent residence, or

(B) A citizen parent of the citizen parent has been physically present in the United States or its outlying possessions for a period or periods totaling not less than 5 years, at least 2 of which were after attaining the age of 14 years.

(b) ATTAINMENT OF CITIZENSHIP STATUS; RECEIPT OF CERTIFICATE.-Upon approval of the application (which may be filed abroad) and, except as provided in the last sentence of § 337(a), upon taking and subscribing before an officer of the Service within the United States to the oath of allegiance required by this Act of an applicant for naturalization, the child shall become a citizen of the United States and shall be furnished by the Attorney General with a certificate of citizenship.

The record reflects that the applicant's father immigrated to the United States in December 1989 and has satisfied the physical presence requirements.

Legal custody of a child as an element of derivation contained in the 1940 statute, and in the present law, may follow judicial proceedings which either terminate the marriage completely, as by absolute divorce, or which merely separate the parties without destroying the marital status. Generally, the question of legal custody may be determined by the law of a state or by the adjudication of a court, whether this be in proceedings relating to the termination of the marital relationship or in separate proceedings dealing solely with the question of the child's custody. In the absence of such determination, the parent having actual uncontested custody of the child is regarded as having the requisite "legal custody" for immigration purposes, provided that the required "legal separation" of the parents has taken place. See INTERP 320.1(a)(6).

The applicant's father became the beneficiary of a preference visa petition on December 2, 1988. The applicant and his mother applied for and were issued immigrant visas as derivative beneficiaries to accompany or to follow to join the principal alien. At the time the

father was interviewed in September 1995 regarding his application for naturalization, the applicant's father had divorced the applicant's mother on June 1, 1995 in Thailand, was residing in [redacted] and indicated on his application that his son (the applicant) was in Thailand with his mother. The applicant's father then remarried in November 1995. The present application was received by the Service office on January 3, 2000. On March 7, 2000, the applicant's parents executed an agreement before a notary public regarding the custody and visitation rights concerning the applicant. This agreement was entered into nearly five years after the parent's divorce and two months after the application was filed with the Service.

The record is devoid of documentation relating to the "legal custody" laws of the State of New York or the State of Maine. Therefore, a determination cannot be made whether the notarized statement, signed by the applicant's parents five years after their divorce and two months after the application was filed, satisfies the State of New York's or Maine's "legal custody" statutes.

Further, the applicant was allegedly residing in Thailand in 1995 with his mother. The record is devoid of information or documentation showing when he and/or his mother returned to the United States to resume permanent residence.

8 C.F.R. 322.2(a) provides that to be eligible for "expeditious naturalization" under § 322 of the Act, a child on whose behalf an application for naturalization has been filed by a parent who is, at the time of filing, a citizen of the United States, must:

> (1) Be unmarried and under 18 years of age, both at the time of application and at the time of admission to citizenship;
>
> (2) Reside permanently in the United States, in the physical and legal custody of the applying citizen parent, pursuant to a lawful admission to citizenship;
>
> (3) Comply with other requirements for naturalization as provided in the Act....

8 C.F.R. 341.2(c) provides that the burden of proof shall be on the claimant to establish the claimed citizenship by a preponderance of the evidence. The question of legal custody has not been determined by the law of a state or by the adjudication of a court and was not determined at the time of the parent's divorce in Thailand. The applicant has failed to establish that he was or is in the legal custody of his father as required under § 322 of the Act. Therefore, the appeal will be dismissed.

ORDER: The appeal is dismissed.